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## CURRENT TOPICS.

*Regina v. Morby*, a recent decision of the English High Court, is an interesting illustration of the doctrine that causing death by the neglect of a duty imposed by law amounts to manslaughter, and also of the practical difficulty of fixing the criminal liability for such an offense where the neglect in question consisted in the failure to provide medical attendance for a person dependent upon the prisoner, and for whom the law charged him with the duty of providing such attendance. The facts of the case were these: The prisoner's son, a child of eight years, living with, and dependent upon him, was sick of confluent small-pox. And although the prisoner had ample means and opportunity to provide medical aid, he wilfully neglected to do so because, being one of the "Peculiar People," he did not believe in medical aid, but trusted in prayer and anointment alone. See *Epistle of St. James*, c. 5, v. 14. No medical man saw the deceased during life; but Dr. Sharpe, who made a *post mortem* examination of the body, stated that death was undoubtedly due to small-pox; that small-pox is a disease requiring medical advice and skill, great attention and great care, and, if not attended to, is calculated to spread.

This question was put to Dr. Sharpe: "In your opinion, do you think the life of the deceased might have been probably prolonged if medical skill had been called in?" to which he answered thus: "Probably; but I would rather put it in this way; that the chances of the boy's life would have been increased by having medical advice."

It being urged by counsel that there was no proof that death was accelerated by the neglect, Dr. Sharpe was recalled, and was interrogated with the following result:

Q.—In your judgment, if medical advice and assistance had been called in at any stage of this disease, might the death have been averted altogether?

A.—I can only answer that by saying that it *might* have been. Ours is not a positive science. It might have been averted if med-

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ical aid had been called in at any earlier stage. I am unable to say whether it probably would. I might say probably as to whether life might have been prolonged. I can not say that death would probably have been averted. I think it probable that life might have been prolonged. I can only say *probably might*, because I did not see the case while living. I am unable to say that life *would* probably have been prolonged, because I did not see the case during life. Had I done so, I might have been able to answer the question.

A verdict of guilty was rendered, and the following questions reserved for the court:

1st. Whether there was any evidence that the life of the child would have been prolonged for any period of time, however short, if the prisoner had called in and provided medical aid—or, in other words, that death was accelerated by his breach of duty? and 2. Whether, assuming the prisoner to have accelerated the death of the child by his breach of duty in wilfully neglecting to provide for it medical aid as aforesaid, he was properly convicted of manslaughter?

Say the court (Lord Coleridge, C. J.): "It was not enough to sustain the charge of manslaughter to show that the parent had neglected to use all reasonable means of saving the life of his child; it was necessary to show that what the parent neglected to do had the effect of shortening the child's life." And again, (Grove, J.): "The jury, by their verdict, say what the medical witness expressly declined to say, that is, that the boy's life would have been prolonged by calling in medical assistance. The prosecution was bound to give affirmative evidence that the death was caused by the neglect of the prisoner to call in medical assistance." But there is no question that such neglect, were the proof satisfactory that it resulted in death, would amount in law to the crime of manslaughter. In this case the duty to provide such medical attendance was specially imposed on him by statute. 31 & 32 Vic., c. 122, s. 37. There is, however, hardly any doubt that under the circumstances detailed, the duty to provide medical aid and the criminal liability for a failure to do so, would be the same without the statutory enactment. In *State v. Smith*, 65 Me. 257, in which it appeared that the prisoner neglected to provide necessary clothing, shelter and protection

from cold and inclemency of the weather for his insane wife during a number of cold days in winter, in consequence of which she was taken sick and died, a conviction was sustained. But the duty, the neglect of which resulting in death will amount to manslaughter, must be a *legal* duty. The neglect of mere moral obligation is not sufficient. "Thus where a girl eighteen years old was taken in labor at the house of her step-father during his absence, and the mother omitted to procure for her the services of a midwife, yet there was no evidence of the mother's having the means to pay for the services, but from the want of them the girl died, the court held that this mother was not legally bound under the circumstances to procure a midwife, and therefore she could not be convicted of manslaughter." 2 Bish. Cr. Law, sec. 643, commenting on *Reg. v. Shepperd*, Leigh & C. 147.

### CITY LICENSES.

The imposition of license fees by municipal corporations gives rise to a variety of interesting questions, upon which the courts are continually adjudicating, concerning the scope and validity, the amount, application and enforcement of such exactions. These questions will be presented in the light of recent decisions, with an aim to show the entire field of controversy and the net result of the authorities.

1. *Power to Grant and Right to Require.*—Important problems of constitutional and statutory interpretation have arisen in this connection. It seems to be settled, in the first place, that municipal corporations may be authorized to require persons exercising vocations within their limits, to take out licenses therefor,<sup>1</sup> and may require the payment of a reasonable sum in consideration of the license,<sup>2</sup> unless there is some specific

limitation on the authority of the legislature in these respects.<sup>3</sup> And this is so, according to the most recent work on corporations,<sup>4</sup> although such persons have already obtained licenses from the State to prosecute their respective callings,<sup>5</sup> and the power may be exercised over all persons plying the vocation within the corporate limits, whether they reside within them or not.<sup>6</sup> So a license may be exacted of a stage company, though its business of carrying passengers is not conducted within the municipal limits, as this fact does not make the receiving of such passengers, and discharging them, and contracting for them, less a business in the city.<sup>7</sup> It has been ruled, also, by the Supreme Court of the United States, that a city may impose a license fee upon an express company desiring to transact business within the corporate limits, although the business of the company extends beyond the limits of the State.<sup>8</sup> It is even competent, according to some authorities, for the legislature, in the absence of constitutional restrictions, to empower a municipality to license within its limits occupations which are illegal and punishable under the general laws of the State.<sup>9</sup>

But the right to license occupations, etc., must be plainly conferred;<sup>10</sup> and power to license and regulate a lawful and necessary business confers no authority to make a con-

<sup>3</sup> *Savannah v. Charlton*, 36 Ga. 460; *Mayor, etc. v. Ville*, 3 Ala. 137; *Welch v. Hotchkiss*, 39 Conn. 140; *People v. Mulholland*, 10 N. Y. Week. Dig. 564.

<sup>4</sup> *Boone Corp.*, sec. 296.

<sup>5</sup> *State v. Columbia*, 6 Rich. 1; *Wright v. Mayor, etc.*, 54 Ga. 545. But it is noted in *Cooley on Taxation*, 411, that where one holds a license from the State or county, he can not, without legislation expressly permitting it, be compelled to take out a license in a city as a condition of doing business within the city limits. *Robinson v. Franklin*, 1 Humph. 156; *Hannibal v. Guyott*, 18 Mo. 515. Yet where the State law permits it, or where, at the time of granting the county or State license, a valid city ordinance required a city license, it may be exacted. See *Napier v. Hodges*, 21 Tex. 287; *Independence v. Noland*, 21 Mo. 394.

<sup>6</sup> *Commissioners, etc. v. Capehart*, 71 N. C. 156; *City of Memphis v. Bataille*, 8 Heisk. 524. See, also, the recent case of *Frommer v. Richmond*, 31 Gratt. (Va.) 646.

<sup>7</sup> *Sacramento v. Stage Company*, 12 Cal. 134.

<sup>8</sup> *Osborne v. Mobile*, 16 Wall. 479. Compare *Woodruff v. Parham*, 41 Ala. 334.

<sup>9</sup> *Davis v. State*, 2 Tex. Ct. App. 425. Compare *Burlington v. Lawrence*, 42 Ia. 681; *Burlington v. Bumgardner*, id. 673; *Little v. City of Madison*, 49 Wis. 605.

<sup>10</sup> *Dunham v. Trustees, etc.*, 5 Cowen, 462; *Mays v. Cincinnati*, 1 Ohio St. 268; *Plaquemine v. Roth*, 29 La. Ann. 261. And see *Leonard v. Canton*, 35 Miss. 189,

<sup>1</sup> *City of Boston v. Schaffer*, 9 Pick. 415; *Slaughter v. Commonwealth*, 13 Gratt. 767; *Baber v. Cincinnati*, 11 Ohio St. 534; *Fretwell v. City of Troy*, 18 Kan. 271; *Perdue v. Ellis*, 18 Ga. 586; *City of Burlington v. Lawrence*, 42 Ia. 681; *Lick v. State*, 42 Miss. 316.

<sup>2</sup> *State v. Herod*, 29 Ia. 123; *Durach's Appeal*, 62 Pa. St. 491; *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Hodgson v. New Orleans*, 21 La. Ann. 301; *Osborne v. Mobile*, 44 Ala. 493.

tract creating or tending to create a monopoly.<sup>11</sup> The power can not be delegated by the common council to a particular officer to grant or refuse licenses as he sees fit;<sup>12</sup> but must be exercised by the common council prescribing general rules under which a license may be obtained.<sup>13</sup> In regard to intoxicating liquors, a city ordinance prohibiting their sale without a license, is constitutional,<sup>14</sup> in the absence of general laws of the State controlling the sale of intoxicating liquors.<sup>15</sup> Nor is the power of Congress to regulate commerce infringed, according to the highest Federal tribunal, by a license fee imposed by a city council on sales of beer or ale not manufactured in the city, except as to supplies of such beverages shown to have been manufactured in another State.<sup>16</sup>

A power to license and control vehicles authorizes the exaction of a license fee or tax from those designed to transport coal through the city streets,<sup>17</sup> but not from those used for private convenience or business.<sup>18</sup> With regard to the payment of license fees by street railroad companies, it would appear from the authorities,<sup>19</sup> that municipal corporations have not the right to exact any license fees from such companies, or impose any additional tax upon them for the privilege of running their cars over the streets of cities, without legislative authority conferring this right upon the city. This authority, however, may be implied from the provisions of the act of incorporation.<sup>20</sup> And where the company has accepted a charter providing that it

pay a license fee to the city, it is concluded from questioning the validity of the burden so imposed, although other companies by virtue of a contract with the city, paid no license fees.<sup>21</sup> But the corporate authorities have not this right of exacting license fees independent of legislative authority; and where a city ordinance provided that a company pay a license fee of fifty dollars for each car run by them, or become liable to a penalty, it was held not to be an exercise of municipal authority reserved by the grant, and that the penalty could not be imposed for non-compliance with an illegal exaction.<sup>22</sup> With much less right could the municipal authorities impose such license fees after having entered into a contract with the company, prescribing the regulations to which the latter shall be subject, and requiring no further license, and reserving no right to require one.<sup>23</sup>

2. *Objects of Municipal Licenses.*—The purposes for which city licenses are imposed occupy an important position in determining their validity, especially as affected by the amount of the fee exacted. When a power to license is given, the intendment must be that regulation is the object, in the absence of special words or circumstances which indicate that the raising of revenue was contemplated.<sup>24</sup> In the latter case,<sup>25</sup> the extent of the tax must be left to the discretion of the municipal government, though the grant of authority would not warrant that the license fees should be made so heavy as to be prohibitory, thereby defeating the purpose.<sup>26</sup>

Where regulation is the object of the license, however, it must be such a fee as will legitimately assist in the regulation; and hence it should not exceed the necessary or probable expense of issuing the license, and of inspecting and regulating the business

<sup>11</sup> *Gale v. Kalamazoo*, 23 Mich. 344; *Tugman v. Chicago*, 78 Ill. 405; *Hayes v. Appleton*, 24 Wis. 542; *Logan v. Pyne*, 43 Ia. 524. And compare *Barling v. West*, 29 Wis. 307; *Tuckahoe Canal Co. v. Tuckahoe R. Co.*, 11 Leigh, 42; *Missouri v. Fisher*, 52 Mo. 47; *Commonwealth v. Brooks*, 109 Mass. 355.

<sup>12</sup> *East St. Louis v. Wehning*, 50 Ill. 28.

<sup>13</sup> *Darling v. St. Paul*, 19 Minn. 389; *Kinmundy v. Mahan*, 72 Ill. 462. Compare *Decorah v. Dunstan*, 38 Ia. 96.

<sup>14</sup> *City Council v. Ahrens*, 4 Strob. 241. See *Howe v. Treasurer*, etc., 37 N. J. L. 145; *Kitson v. Ann Arbor*, 26 Mich. 325.

<sup>15</sup> *Heisembrittle v. City Council*, 2 McMull, 233. Compare *Ex parte Burnett*, 30 Ala. 461; *State v. Clark*, 28 N. H. 176; *State v. Freeman*, 38 Id. 426.

<sup>16</sup> *Downham v. Alexandria*, 10 Wall. 173.

<sup>17</sup> *Gartside v. East St. Louis*, 43 Ill. 47.

<sup>18</sup> *St. Louis v. Grone*, 46 Mo. 574. And see *Collinsville v. Cole*, 75 Ill. 114.

<sup>19</sup> According to an article by W. H. Whitaker, in 12 Cent. L. J. 56.

<sup>20</sup> *Covington St. Railway v. Covington*, 9 Bush (Ky.), 129.

<sup>21</sup> *New York v. Broadway, etc. R. Co.*, 17 Hun. (N. Y.) 242.

<sup>22</sup> *New York v. Third Ave. R. Co.*, 33 N. Y. 42.

<sup>23</sup> *New York v. Second Ave. R. Co.*, 4 Barb. 41.

<sup>24</sup> See *Cooley on Taxation*, 408.

<sup>25</sup> According to the same writer.

<sup>26</sup> *Ex parte Burnett*, 30 Ala. 482; *Craig v. Burnett*, 32 Id. 728; *Burlington v. Ins. Co.*, 31 Ia. 102; *Kitson v. Ann Arbor*, 26 Mich. 325; *Mason v. Lancaster*, 4 Bush, 406; *Kniper v. Louisville*, 7 Id. 601. It has been recently ruled that it can not be assumed judicially that a city ordinance requiring the payment of fifty dollars every ninety days for the privilege of retailing liquors in quantities less than one quart, is a virtual prohibition of the sale of such liquors. *Ex parte Hine*, 49 Cal. 557.

which it covers. This view is developed by decisions in the following States: Alabama,<sup>27</sup> Iowa,<sup>28</sup> Kentucky,<sup>29</sup> Maryland,<sup>30</sup> Massachusetts,<sup>31</sup> Michigan,<sup>32</sup> Missouri,<sup>33</sup> New Jersey,<sup>34</sup> Ohio,<sup>35</sup> and Pennsylvania.<sup>36</sup> It is also declared by the Supreme Court of the United States,<sup>37</sup> and laid down by the text-writers.<sup>38</sup>

On the other hand, the amount of such license for purposes of regulation may cover not only the direct but also the incidental expenses to which the public are likely to be put by reason of the business being conducted. The latter may sometimes be the more important, as in the case of the manufacture and sale of intoxicating drinks. The license fee in such instances will not be held excessive unless it is manifestly something more than a fee for regulation.<sup>39</sup> It is in regard to liquor licenses that the distinction between a license for revenue and for regulation has been most thoroughly discussed. Thus in one instance of this character, the court remarked: "The license fee for retailing liquors is in no proper sense a tax. Its object is not to raise revenue. The license is part of the public regulations of the country, and the fee is intended rather to prevent the indiscriminate opening of such establishments than to raise the revenue by taxation."<sup>40</sup>

3. *Distinguished from Tax.*—It results from the statement of the two objects, revenue and regulation, for which license fees may be imposed, that a license is not necessarily a tax. Even the fact that the license fee is payable into the treasury of the muni-

cipality, provided the fee be a reasonable one, does not impress it with the character of a tax.<sup>41</sup> So statutory restrictions on the right of a city to tax real and personal property, do not affect the right of the city authorities to exact a license tax on business.<sup>42</sup> Conversely, it is also true, that a tax on business is not necessarily a license to conduct it. On this point the Supreme Court of Michigan has said:<sup>43</sup> Taxes upon business are usually collected in the form of license fees; and this may possibly have led to the idea that seems to have prevailed in some quarters, that a tax implied a license. But there is no necessary connection whatever between them. A business may be licensed and yet not taxed, or it may be taxed and yet not licensed. And so far is the tax from being necessarily a license, that provision is frequently made by law for the taxation of a business that is carried on under a license, existing independent of the tax. Such is the case where cities under proper legislative authority tax occupations that are carried on under licenses from the State.<sup>44</sup>

But while a particular license may not be a tax in the strict revenue sense, but rather a permit, privilege or franchise to do a certain act, for which a fee is charged, it has been held a tax in the larger sense, as being a charge, or burden, imposed upon persons, property or business, to raise money for public purposes;<sup>45</sup> and may, therefore, be regarded as a tax in determining the jurisdiction of courts over a contest concerning a wharf license imposed by a city.<sup>46</sup> The question whether a license fee is a tax or not, has arisen most frequently where it has been imposed on the cars of street railroad companies, and has, in this class of cases, been decided in accordance with the principles previously stated.<sup>47</sup>

<sup>41</sup> Frankford, etc. R. Co. v. Philadelphia, 58 Pa. St. 119; State v. Herod, 29 Iowa, 123; Johnson v. Philadelphia, 60 Pa. St. 442.

<sup>42</sup> Johnston v. Macon, 62 Ga. 645.

<sup>43</sup> Youngblood v. Sexton, 32 Mich., 406.

<sup>44</sup> Ould v. Richmond, 23 Grat. 464; Napier v. Hodges, 31 Tex. 287; Cuthbert v. Conley, 32 Ga. 211; Wendover v. Lexington, 15 B. Mon. 258.

<sup>45</sup> See Cooley on Const. Lim., 201.

<sup>46</sup> City of Santa Barbara v. Stearns, 51 Cal. 490, 501, and local authorities cited.

<sup>47</sup> See Allerton v. City of Chicago, etc., 20 Am. L. Reg. 473, and notes upon that late Federal case by Adelbert Hamilton, fully discussing the subject. Compare, also, State v. Hoboken, 41 N. J. L. 71, where a provision in a city charter giving power to "license

<sup>27</sup> Mobile v. Miller, 3 Ala. 137.

<sup>28</sup> State v. Herod, 29 Ia. 123; Burlington v. Ins. Co., 31 Ia. 102.

<sup>29</sup> Collins v. Louisville, 2 B. Mon. 134.

<sup>30</sup> State v. Roberts, 11 Gill. & J. 506.

<sup>31</sup> Commonwealth v. Stodder, 2 Cush. 532; Boston v. Schaffer, 9 Pick. 415.

<sup>32</sup> Chilvers v. People, 11 Mich. 43; Ash v. People, Id. 347.

<sup>33</sup> St. Louis v. Boatman's Ins. & Trust Co., 47 Mo. 150.

<sup>34</sup> Freeholders v. Barber, 7 N. J. 64; Kip v. Patterson, 26 N. J. 298; State v. Hoboken, 33 N. J. 280.

<sup>35</sup> Mays v. Cincinnati, 1 Ohio (N. S.), 268; Baker v. Hamilton, 11 Id. 534; Cincinnati v. Bryson, 15 Id. 625; Cincinnati Gaslight Co. v. State, 18 Id. 243.

<sup>36</sup> Bennett v. Birmingham, 31 Pa. St. 15.

<sup>37</sup> Ward v. Maryland, 12 Wall. 429.

<sup>38</sup> Cooley on Taxation, 408; Dillon Mun. Corp., sec. 409.

<sup>39</sup> See Ash v. People, 11 Mich. 347; Burlington v. Ins. Co., 31 Ia. 102; Johnson v. Philadelphia, 60 Pa. St. 445.

<sup>40</sup> Burch v. Savannah, 42 Ga. 506, 508.

4. *Occupations and Transactions Liable for License Fees.*—The privilege of following a certain vocation or occupation, or pursuing a certain business, is subject to taxation by municipalities, usually in the form of the requirements of license fees. Among the most prominent instances,<sup>48</sup> are the occupations of hackmen, draymen, hawkers, auctioneers, etc.;<sup>49</sup> and sellers and manufacturers of intoxicating liquors.<sup>50</sup> License fees have been sustained when imposed on the pursuits of the business of insurance;<sup>51</sup> the running of street railway cars;<sup>52</sup> the conducting of lotteries, where permitted to exist;<sup>53</sup> and of games of chance or hazard of every description, when made lawful at all;<sup>54</sup> and the keeping of dogs and of billiard tables.<sup>55</sup> Under recent rulings, a milk-dealer who sells from his wagon, though he serves regular customers, too, is a peddler; and where peddlers, under the ordinance of a city, must be licensed, he must take out a license.<sup>56</sup> So, under the power given to the common council of Syracuse by the charter, to license peddlers, and to make such ordinances not in violation of the State or Federal laws as they

and regulate" was held not to authorize the city to exact a license from a previously incorporated horse-railway company, because a mere police power was regarded as not importing a power of taxation.

<sup>48</sup> Noted by Cooley.

<sup>49</sup> Cincinnati v. Bryson, 15 Ohio, 625; Nightingale's Case, 11 Pick. 168; White v. Kent, 11 Ohio (N. S.), 550; Adams v. Somerville, 2 Head, 363; State v. Crawford, Id. 460; Buffalo v. Webster, 10 Wend. 99; Brooklyn v. Breslin, 57 N. Y. 591.

<sup>50</sup> Perdue v. Ellis, 18 Ga. 586; Thomasson v. State, 15 Ind. 449; Aulainer v. Governor, 1 Tex. 653; Smith v. Adrian, 1 Mich. 495; Gardner v. People, 20 Ill. 43; License Cases, 5 Haw. 504; License Tax Cases, 5 Wall. 472. See, also, Durach's Appeal, 62 Pa. St. 491, and the recent case of *Ex parte Hurl*, 49 Cal. 567.

<sup>51</sup> Fire Department v. Helfenstein, 16 Wis. 136.

<sup>52</sup> Frankford, etc. R. Co. v. Philadelphia, 58 Pa. St. 119; Johnson v. Philadelphia, 60 Id. 445; State v. Herod, 29 Iowa, 123. Compare cases cited under heads of "Power to Grant," etc., and "Distinguished from Tax."

<sup>53</sup> Wendover v. Lexington, 15 B. Mon. 258.

<sup>54</sup> See Washington v. State, 13 Ark. 752; Lewellen v. Lockhart, 21 Gratt. 570; Tanner v. Albion, 5 Hill, 121; State v. Hay, 29 Mo. 457; State v. Freeman, 38 N. H. 426; Commonwealth v. Colton, 8 Gray, 488.

<sup>55</sup> As to the former, see Carter v. Daw, 16 Wis. 299; Tenney v. Lenz, Id. 567; Blair v. Forehand, 100 Mass. 136; Morey v. Brown, 42 N. H. 373; Mitchell v. Williams, 27 Ind. 62. As to keepers of billiard-tables, see Washington v. State, 13 Ark. 572, overruling Stevens v. State, 2 Ark. 291; see, also, Straub v. Gordon, 27 Id. 626.

<sup>56</sup> Chicago v. Bartee (decided September 21, 1881), 100 Ill. 57; s. c., 12 Reporter, 650.

shall deem proper, they may compel milk-dealers to take out licenses.<sup>57</sup>

As previously mentioned, a power to license vehicles covers coal wagons, but not private conveyances.<sup>58</sup> So, according to a late ruling, the city council of Richmond may, under its charter, require one who resides outside the city limits, but rents a stall in the market-house, to take out a license for using his cart and horse to bring meats from his house to the stall, and to pay a tax on the license.<sup>59</sup> With regard to the validity of sample-sellers' licenses, the decisions are not in harmony, much, however, depending on the character of the special regulation.<sup>60</sup> As to lawyers, it has been held that a city had no power to lay a license tax on them without special authority in the charter.<sup>61</sup>

5. *Issuance, Revocation and Collection.*—The issuance of city licenses is often restricted by conditions which applicants must first comply with. Thus a requirement that the applicant for a license to sell liquor should produce the recommendation of four of his nearest neighbors, has been sustained.<sup>62</sup> As already noted, the power to issue licenses can not be delegated by the common council to a particular officer to act at his discretion, but must be exercised by that body under general rules.<sup>63</sup> A license granted upon certain speci-

<sup>57</sup> People v. Mulholland, 19 Hun, 548. As to the validity of a city ordinance imposing a license tax upon peddlers, see *Ex parte Ah Foy* (California Sup. Ct., November 18, 1880), 6 Pac. C. L. J. 613.

<sup>58</sup> Gartside v. East St. Louis, 43 Ill. 47; St. Louis v. Grone, 46 Mo. 574.

<sup>59</sup> Frommer v. Richmond, 31 Gratt. 646. Requiring a cartman to take out a license under penalty, is not void as being in restraint of trade. Brooklyn v. Breslin, 57 N. Y. 591.

<sup>60</sup> As types of the decisions sustaining such licenses, see Commonwealth v. Smith, 6 Bush. 303; Mork v. Commonwealth, Id. 397. It has recently been ruled, on the other hand, that an ordinance for such purpose, which imposes different rates for selling goods which are within the corporate limits, or on the way to the city, from those fixed for selling goods otherwise situated, is invalid as unjust, unequal, partial, oppressive and in restraint of trade. *Ex parte Frank*, 52 Cal. 606.

<sup>61</sup> City of St. Louis v. Laughlin, 49 Mo. 559.

<sup>62</sup> Whitten v. Milledgeville, 43 Ga. 421. So a collector of city licenses, who could grant a license to retail liquors only upon the consent of a majority of the board of police commissioners, was justified in refusing it where such consent was not obtained. Purdy v. Linton, 56 Cal. 133. But the applicant is entitled to the license if he complies with the statutory conditions. State v. Justices, 15 Ga. 408; Hill v. Decatur, 22 Id. 293; Cooley on Taxation, 413.

<sup>63</sup> East St. Louis v. Wehring, 50 Ill. 28; Darling v

fied conditions,<sup>64</sup> may be revoked as a penalty for a violation of the conditions.<sup>65</sup> Indeed, under statutory provisions, licenses may be recalled or revoked for the misbehavior of those holding them, as they may be terminated by changes in the laws.<sup>66</sup> Some courts have been inclined to hold, however, that a license, unless for misconduct, can not be revoked except on a return of the fee.<sup>67</sup>

The collection of license fees is a matter largely regulated by statute. It has been decided that a municipal corporation empowered to grant licenses and to impose a fee therefor, may lawfully make the failure to take out a license and pay the fee subject the offender to the penalty of fine and imprisonment.<sup>68</sup> But the municipality can not recover the amount which would have been due for a license if one had been taken out. Its only recourse in such a case against a person carrying on a business for which a license is required, who neglects or refuses to take out a license, is to hold him subject to a criminal prosecution, or liable for a specific penalty.<sup>69</sup>

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St. Paul, 19 Minn. 389; Kimmundy v. Mahan, 72 Ill. 462. Compare Decorah v. Dunstan, 38 Iowa, 96.

<sup>64</sup> Boone on Corp., sec. 296.

<sup>65</sup> Hurber v. Baugh, 43 Iowa, 514.

<sup>66</sup> See Cooley on Taxation, 414, and cases referred to.

<sup>67</sup> Ibid, citing Adams v. Hackett, 7 Fost. 289, 294; State v. Phalen, 3 Harr. 441; Boyd v. State, 46 Ala. 329.

<sup>68</sup> Ibid, referring to Cincinnati v. Buckingham, 10 Ohio, 257; White v. Kent, 11 Ohio (N. S.), 550; Vaudine, Petitioner, 6 Pick. 187; Nightingale, Petitioner, 11 Id. 167; Shelton v. Mobile, 3 Ala. 540; Chilvers v. People, 11 Mich. 43; Brooklyn v. Cleves, Lalor, 231; Buffalo v. Webster, 10 Wend. 99. *Contra*, Butler's Appeal, 73 Pa. St. 448.

<sup>69</sup> Santa Cruz v. Santa Cruz R. Co., 56 Cal. 143.

## EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS.

Previously to the establishment of the doctrine of equitable mortgage by deposit of title deeds, it was held that the mere possession of them gave the holder no interest in the estate, except collaterally, as in the instance put by Lord Eldon in *Ex p. Hooper*.<sup>1</sup> The foundation on which rests the now received doctrine

was laid by Lord Thurlow, in *Russell v. Russell*.<sup>2</sup> And, notwithstanding the statute of frauds, it is now settled that the deposit of title deeds, even without verbal communication, is *per se* evidence of an agreement executed for a mortgage of the estate.<sup>3</sup> Such equitable mortgages may, then, be created with or without a memorandum in writing;<sup>4</sup> and if the deeds are deposited without any memorandum, parol evidence may be admitted to explain the nature of such deposit, while if the documents deposited were not all specified in the memorandum, the whole may still be deemed included;<sup>5</sup> and the absence of a written memorandum does not take the mortgage out of the operation of Locke King's Act, 17 & 18 Vic., ch. 113.<sup>6</sup> This species of security, however, has excited much judicial disapprobation.<sup>7</sup> Lord Eldon, indeed, denounced the decisions by which the doctrine was established, as virtually repealing the statute of frauds;<sup>8</sup> and repeatedly declared his determination not to extend that doctrine, while expressing his surprise that it ever was admitted.<sup>9</sup> And in Mackeson's edition of Coote on Mortgages, it is said: "How far its existence in deterioration of the public revenue, by diminishing the amount of stamp duties, is of sufficient importance to attract the notice of the Legislature, remains to be seen." And again: "On a review of the decided cases establishing this mode of mortgage security, it is perhaps to be regretted that the old law was not adhered to, and the principle on which the statute of frauds was founded more respected. For although equity, by declaring the deposit itself to be evidence of an agreement executed, has contrived to evade the strict and literal wording of the statute, yet it is manifest that the door has been in some degree open to fraud and perjury; nor does a creditor seem to deserve much favor

<sup>1</sup> 1 Bro. C. C., 269.

<sup>2</sup> *Ex parte* Wright, 19 Ves. 258.

<sup>3</sup> *Russell v. Russell*, *ubi supra*; *Ex parte* Langston, 17 Ves. 230; *Ex parte* Wright, 19 Ib. 258; *Ex parte* Mountfort, 14 Ib. 606; *Parker v. Housefield*, 2 Myl. & K. 419.

<sup>4</sup> *Ferris v. Mullins*, 2 Sm. & G. 378.

<sup>5</sup> *Davis v. Davis*, 24 W. R., 962.

<sup>6</sup> *Ex parte* Haigh, 11 Ves. 403; *Norris v. Wilkinson*, 12 Id. 192; *Ex parte* Whitbread, 19 Id. 211; *Ex parte* Hooper, 1 Mer. 7.

<sup>7</sup> *Ex parte* Whitbread, *ubi supra*.

<sup>8</sup> *Featherstone v. Fenwick*, *Harford v. Carpenter*, 1 Bro. C. C. 270, n.

<sup>1</sup> Mer. 7; see Coote. *Mtge.* (4th ed.) 310.

who will not be at the trouble of a few lines in writing;<sup>10</sup> if he is desirous to have a charge on his debtor's estate. If the debtor denies that the deposit was intended to cover future advances, as in *Ex parte Mountfort*;<sup>11</sup> or if he insist that the deeds were not delivered by way of deposit but with a different intent, resort must, in many cases, be had to parol evidence; and, as remarked by Lord Eldon,<sup>12</sup> 'the mischief of all these cases is, that the court is deciding upon parol evidence with regard to an interest in land within the statute of frauds.' " As regards future advances, indeed, a person who has obtained a legal mortgage may be in a worse position than an equitable mortgagee, under the distinction which was made to avoid an extension of the doctrine acted upon in *Ex parte Langston*;<sup>13</sup> and, as observed in *Fisher on Mortgages*, 3d ed., "the result justifies the remark made in another case by Lord Eldon, that 'departing from the statute (of frauds), we have no rule to go by.' "

Lord Eldon himself, however, accepted the doctrine as settled law; and it has been held that, where the *lex loci rei sitæ* does not forbid, and the parties do not contract with reference to any other particular law, and the general law of the place is English, an equitable lien will be created upon land by a deposit of title deeds.<sup>14</sup> In America, too, the English doctrine has been adopted.<sup>15</sup> As regards the nature and character of such a mortgage, Ball, C. observed, in *M'Kay v. M'Nally*:<sup>16</sup> "I do not know that this is anywhere better stated than by Lord Cottenham, in *Parker v. Housefield*.<sup>17</sup> Speaking of the analogy between legal mortgages and mortgages by deposit, he says, 'To determine this it is material, in the first place, to consider in what light courts of equity view such equitable mortgages; and it appears that a deposit of title deeds has always been considered as an imperfect mortgage, which the mortgagee is entitled to have perfected, or rather as a

contract for a mortgage, which, according to the well known doctrine of courts of equity, would give to the party claiming the benefit of such contract all such rights as he would be entitled to if the contract had been completed.' " <sup>18</sup> Such a mortgage does not constitute a breach of a covenant not to "mortgage, sell, assign or otherwise part with" an indenture of lease, or the premises thereby demised.<sup>19</sup> And such an equitable mortgagee will have preference over a subsequent purchaser or mortgagee of the legal estate, with notice of the charge by deposit;<sup>20</sup> which notice will be implied from the nature of the transaction, as if the subsequent purchaser or mortgagee was informed that the creditor was in possession of the title deeds, and neglected to make inquiry for what purpose he held them;<sup>21</sup> and so, even though the purchaser only had notice by a letter stating that the memorandum (unregistered) of deposit was "useless."<sup>22</sup> But a purchaser who has notice that the title deeds of the property are deposited with a bank to secure a current account is not bound to inquire whether the bank has made fresh advances on the security of the vendor's lien for unpaid purchase-money, and the burden lies on the bank, if it makes such advances, to give notice to the purchaser.<sup>23</sup>

As regards the effect of an equitable mortgage by deposit of title deeds, unaccompanied by any memorandum in writing, and unregistered under the Registry Act, 6 Anne (Ir.), c. 2, as against a *bona fide* purchaser without notice, under a subsequent registered conveyance for value, *In re Burke's Estate*, decided by the Court of Appeal in December last, has decided that the equitable mortgagee (with whom in that case an agreement for a lease had been deposited) is entitled to priority; following *Sumpter v. Cooper*,<sup>24</sup> and *In re Stephens' Estate*,<sup>25</sup> and overruling *In re M'Kinney's Estate*.<sup>26</sup>

<sup>18</sup> And see *Crone v. Hegarty*, 13 Ir. L. T. Rep. 86; *In re Girdwood's Estate*, 14 Ir. L. T. Dig. 9.

<sup>19</sup> *M'Kay v. M'Nally*, *ubi supra*.

<sup>20</sup> *Jones v. Williams*, 24 Beav. 27; *Leigh v. Lloyd*, 35 Ib. 455.

<sup>21</sup> *Hiern v. Mill*, 13 Ves. 114.

<sup>22</sup> *Christie v. Farr*, 16 Ir. L. T. 103; see *Coote, Mtgs.* (4th ed.), 779; 7 Ir. L. T. 29.

<sup>23</sup> *London and County Bank v. Ratcliffe*, 6 App. 722; 51 L. J. Ch. 28.

<sup>24</sup> 2 B. & Ad., 223.

<sup>25</sup> 1 R., 10 Eq. 232; 10 Ir. L. T. Dig., 15.

<sup>26</sup> 6 Ir. L. T. Rep., 179; 1 R., 6 Eq. 445.

<sup>10</sup> *Ex parte Whitbread*, *ubi supra*.

<sup>11</sup> 14 Ves., 606.

<sup>12</sup> *Ibid.*

<sup>13</sup> 17 Ves., 227.

<sup>14</sup> *Varden Seth Sam v. Luckpathy Royjee Lallah*, 9 Moo. Ind. App. 303.

<sup>15</sup> *Griffin v. Griffin*, 3 C. E. Green, 104; *Brewer v. Marshall*, 4 Ib. 537; *Gale v. Morris*, 29 N. J. (Eq.) 222; *English v. M'Elroy*, 8 Rep. 13.

<sup>16</sup> 13 Ir. L. T. Rep., 130.

<sup>17</sup> 2 Myl. & K., 420; 4 L. J. Ch., 57.

The well known and often canvassed decision of Judge Lynch in *Re M'Kinney's Estate*,<sup>27</sup> he had himself hoped would have been appealed from, as did a commentator in these pages;<sup>28</sup> but, perhaps because the amount of property involved was inconsiderable, that decision passed unchallenged. Previously, the point had, indeed, been regarded as settled law, to the opposite effect; but, as Law, C., observed in *Re Burke's Estate*, Judge Lynch was unfortunately misled by the imperfect report of the appellate decision in *The Agra Bank v. Barry*.<sup>29</sup> Lord Justice Christian, also, animadverted on the misapprehension thus arising, in *Reilly v. Garnett*;<sup>30</sup> yet, he observed, undoubtedly *Re M'Kinney's Estate* "has placed the law upon this most reasonable footing, that registration is a protection against all secret and unregistered titles whatsoever, whether their absence from the Registry was because they were neglected to be placed there, or because they were incapable of being placed there. It is impossible to avoid being struck by the good sense of this, and of the reasons which were given for it." This was in 1872, while so lately as in *Clearly v. Fitzgerald*,<sup>31</sup> we find Fitzgibbon, L. J., also remarking: "I foresee great danger in admitting that, by adopting irregular modes of charging lands by parol, the effect of the Registry Acts may be avoided." At last, however, after a most careful and elaborate examination of the authorities, this question, affecting such large and varied interests, has been set at rest; and it would be the merest supererogation on our part to discuss at large the many cases, and the train of reasoning founded upon them in connection with the terms of the statute itself, that led the Court of Appeal to its unanimous conclusion. A parol deposit of title deeds does not come within the provisions of the Registry Acts—there is nothing to register; and as Fitzgibbon, L. J., remarked, "our decision may appear in some degree to weaken the security of a registered title, but, if this be so, it is because the lawful operation of a deposit of title deeds, though (to adopt Lord Hatherley's language in *Neve v. Pennell*,<sup>32</sup>) it may

introduce the mischief intended to be remedied by the Registry Acts in another form, does so in a form which the machinery furnished by the Acts can not meet. It is only another instance in which an act of Parliament, appearing when passed to be sufficient, has failed to meet every case which subsequent events, legal ingenuity, or the logical application of known principles, may raise to try its efficacy." We have seen that in *M'Kay v. M'Nally*,<sup>33</sup> a security by deposit of title deeds had already been held not to constitute a "mortgage" within the terms of a covenant—although in three cases (which were not cited) it was held to constitute a charge "by way of mortgage," within Locke King's Act (even if by parol, according to *Davis v. Davis*);<sup>34</sup> and though Tindal, C. J., observed, in *Warburton v. Ivie*,<sup>35</sup> that "every deed by which any interest in lands or tenements is transferred, or any charge created thereon, should be registered," and favored the construction forcing "all transfers and dispositions of every kind, by whomsoever made, to be put upon the face of the register," yet certainly the Act of Anne, in its terms dealing only with "deeds or conveyances," while the word "disposition" in section 4 is controlled and limited by its context, seems hardly to embrace literally the case of parol equitable mortgages by deposit, which indeed were then unknown. In truth, there is nothing in the Act to show that it was intended to apply to all kinds of titles. As it was put by Sir E. Sullivan, M. R.: "Suppose a man marries a woman entitled to a term of years, or to a fee-simple or freehold estate, in each case an estate becomes vested in him by the marriage. Again, by the birth of a living child, an estate by the curtesy may become vested in the husband; none of these titles can be placed upon the Registry. Well, I suppose the extraordinary doctrine could not be contended for that if a wife, separated from her husband, suppressing the fact of marriage, makes a conveyance of the lands which belonged to her at the time of the marriage, the mere registration of such conveyance would defeat her husband's title; which would be the result if the statute applied to all titles, no matter how acquired,

<sup>27</sup> 6 Ir. L. T. Rep. 179.

<sup>28</sup> 6 Ir. L. T. 609.

<sup>29</sup> 1 R. 6 Eq. 128.

<sup>30</sup> 1 R. 7 Eq. 17.

<sup>31</sup> 7 L. R. 1. 265.

<sup>32</sup> H. & M. 187.

<sup>33</sup> 13 Ir. L. T. Rep. 130.

<sup>34</sup> *Ubi supra*.

<sup>35</sup> 2 D. & C. 494.

whether incapable of being put on the Registry or not."<sup>36</sup> Limitations of this kind to the protection afforded by the Registry are, indeed, inseparable from any system of record or registration. As observed by Cooley, C. J., in a paper on the Recording Laws of the United States, read last year before a meeting of the American Bar Association, "it is impossible such records should be an entirely safe reliance, because many things that may affect a title either can not be shown by them under any circumstances, or can not be shown under any provisions of law as yet made for the purpose. Heirship is one of these. If the apparent owner of the record dies, whoever purchases of his supposed heirs must run all risks of error or misinformation in learning who they are. Provision has indeed been made in a few of the States for recording a certificate of the heirship from the court having jurisdiction of the estate of decedents, but these provisions are exceptional, and the certificate would of course be ineffectual to cut off the right of an actual heir, unless under provisions of law which require a judicial hearing and determination, after notice to all concerned. Questions of marital right in lands are also not to be settled by a mere inspection of the record; and not to mention other things which might defeat an apparently good title, it is sufficient for our present purpose to say that any deed in the chain of title may prove to be incorrectly recorded, or be forged, or be given by a minor, and therefore voidable, or by an insane person, and therefore wholly void." It should be observed that in *Re Burke's Estate*, nothing turned on the nature of the particular subject matter of the deposit.<sup>37</sup> It was an agreement for a lease, or purchase, which would be clearly sufficient.<sup>38</sup>

Pressed by the obvious unreasonableness of having to ask the court to strain the language of the acts so as to make them require the registration of this kind of security, for accomplishing which no machinery is furnished, the respondent's counsel proceeded to impeach the policy of permitting mortgages

by a parol deposit at all. On this subject we have already supplied a good deal of additional materials for consideration.<sup>39</sup> But, on the other side, we are surprised that Lord Abinger's vindication of the policy and reasonableness of the doctrine<sup>40</sup> was not quoted. However, as Sir E. Sullivan, M. R., observed: "It appears to me that we have now nothing to do with the policy of allowing securities to be taken by mere deposit—that is a matter for the legislature—and we can not be influenced by the fact that such securities only received their full development after the Registry Act was passed. The law allows of the security, and there is no means of placing it on the Registry; the provisions of the act do not reach the case, and we here can not make them do so. It is too much, however, in any view to suggest, as has been done, that a deposit of deeds is entirely a secret disposition. The deeds are at all events a strong symbol of ownership; and if a person subsequently dealing with the owner, without deeds, makes no inquiry after them, and utterly neglects to ascertain how they are circumstanced, he must only take the consequences." "If any purchaser," observed Fitzgibbon, L. J., "chooses to accept a property without getting possession of those documents of title which have been well called the 'visible badge' of ownership—if he chooses to rest satisfied with any plausible excuse for the non-production of those documents—if he fails to verify the explanation given of their absence, he must take the risk; but the circumstances must be extraordinary, and the cases must be few indeed, in which a person of ordinary caution can be prejudiced. It will in all cases be his plain interest, it will be the duty of his advisers, and it will be open to himself, to insist on getting up the documents of title, to verify the explanation of their absence, or to decline to complete the purchase; but in any case in which a conflict such as the present may arise, between a disposition by deposit and a

<sup>36</sup> *Of*, the Australian case of *Fitzpatrick v. Barker*, 7 S. C. R. Eq. 83.

<sup>37</sup> See 7 Ir. L. T. 29, 30.

<sup>38</sup> *Unity, etc. Co. v. King*, 25 Beav. 72; *Allen v. Woodruff*, 98 Ill.; *Et cf. Ex parte Orrett*, 3 M. & A. 153; *Ex parte Smith*, 2 M. D. & De G. 544; and 4 Madd. 249.

<sup>39</sup> And references may be added to 2 Story Eq. Jur., s. 1020; 4 Kent. Com. 151, observing, *inter alia*, that the disposition of the courts has been to restrict rather than enlarge the operation of the doctrine, and that it is not, therefore, ordinarily applied to enforce parol agreements to make a mortgage, or to make a deposit of title deeds for that purpose; and see, further, as to the extent of the reception of the doctrine in America, 1 Hill. Mtge. 599; Browne Stat. of Frauds, s. 64; *Carter v. Wake*, 16 Am. L. Reg. 447.

<sup>40</sup> In *Keys v. Williams*, 3 Y. & Coll. 60.

conveyance by registered assurance, both being lawful and effective dealings, we have no right artificially to postpone either to the other, and the earlier must prevail." And no doubt those considerations do minimise the practical extent of the decision, as an infringement of the security of registered titles; but cases such as we have had often occasion to comment upon<sup>41</sup> will still continue to recur from time to time; and in one point of view we rather think the effect of this decision is calculated to render equitable mortgages by deposit still more open to the objections that, as we have seen, have been so often advanced against that form of security. It gives an advantage to parol transactions; for, if there be a written memorandum, and it is unregistered—even though informal—a case, at all events, uncovered by the present decision,<sup>42</sup> its operation will be defeated; and, as regards parol transactions, it re-introduces the necessity of having recourse to statutable declarations, etc., and imposes on purchasers and incumbrancers all the burdens that the Registry Act was passed to obviate. Who could now, with any degree of assurance, advise a trustee to take a second mortgage?<sup>43</sup> What protection has a *bona fide* purchaser who duly searches the Registry, and gets in all the known title deeds? His own caution—which, perhaps, may best be exercised by his not becoming a purchaser at all. Still, as Judge Lynch had himself observed in *Re Driscoll's Estate*,<sup>44</sup> quoted by Deasy, L. J., in *Re Burke's Estate*, "if such a transaction creates an equitable security, it would seem rather hard to hold that, while it is incapable of receiving aid or protection from the Registry Acts, it is liable to be defeated by their operation;" and the true remedy appears rather to lie with the Legislature. That, as it stands, this mode of security is open to objection there can be no doubt, as Law, C., allowed in *Re Burke's Estate*; and he then referred to the Irish Registration Act of 1850, and to Lord Westbury's Registry of Title Act, 1862; but, as several commissions and parliamentary committees

have already suggested specific amendments of the law on the assumption that, as existing, it does not afford adequate protection, it will suffice to point to *Re Burke's Estate* as a further illustration that amendment is indeed necessary. The old English notion was that the possession of the title deeds was the best evidence of title; the system of registry was to have supplied a substitute, under which any man might safely purchase, or safely accept incumbrances; but, the possession of the title deeds is now enough to defeat the purpose of the recording laws, and the protection afforded by the system of registry has been rendered completely deceptive or hazardous by the decision in *Re Burke's Estate*, which may, unfortunately, have the effect of not only further diminishing the credit operations of capitalists in this country, but of still more alarming the English investor in our landed securities.—*Irish Law Times*.

#### INSURANCE — ASSIGNMENT OF POLICY — PAYMENT OF PREMIUM.

##### ARMSTRONG v. MUTUAL LIFE INS. CO. OF NEW YORK.

*Circuit Court of the United States, Eastern District of New York.*

1. Policies of life insurance are only assignable so far as made so by express terms. In a policy applied for by A, in which the insurer promises "to pay to A, his assigns, in 1897, \* \* \* or if he should die before that time then to make said payment to his legal representatives," the promise to pay in 1897 is assignable, the promise to pay the representatives upon death is not.

2. An assignment by the insured in general words would not convey the branch of the contract which ran to the representatives.

3. Payment by the assignee of the only premium ever paid before death would not make the insurance his, though he received the assignment simultaneously with the issue of the policy.

4. An assignment by the insured during life of an assignable policy which contained the condition "if any claim be made under an assignment, proof or interest to the extent of the claim will be required," is inoperative, except to the extent of the assignee's interest, and constitutes no defense in the absence of proof that the assignee was related to or was a creditor of the insured.

5. Where the insured delivered an assignment of such policy with the policy to one who then contemplated, and afterwards consummated, the murder of the insured, with intent so to obtain the insurance under such policy and others similarly assigned, no right of the representatives of the insured would be cut off by the wickedness of the murderer.

<sup>41</sup> See 6 Ir. L. T. R., 384; 7 Id., 29; 11 Id., 516.

<sup>42</sup> But see *Eyre v. M'Dowell*, 9 H. L. 652; *In re Hamilton*, 9 Ir. Ch. R. 512.

<sup>43</sup> As to the necessity of inquiry when taking mortgages from trustees, see *Stroughill v. Anstey*, 1 D. M. & G. 635, 648.

<sup>44</sup> 1 R., 1 Eq. 288.

*Herbert T. Ketcham*, for plaintiff; *Joseph H. Choate and Prescott Hall Butler*, for defendant.

WHEELER, J., delivered the opinion of the court:

This was an action of assumpsit upon a policy of insurance issued by the defendant upon the life of John M. Armstrong, the plaintiff's intestate, and has now, after verdict for the plaintiff and before judgment, been heard upon a motion of the defendant for a new trial, in review of questions of law.

The policy was issued upon an application signed by Armstrong, and in its operative and material parts in question ran: "The Mutual Life Insurance Company of New York \* \* \* in consideration of the application for this policy of insurance \* \* \* which \* \* \* every person accepting or acquiring any interest in this contract \* \* \* warrants \* \* \* to be the only statements upon which this contract is made; and \* \* \* of the payment \* \* \* at the date hereof \* \* \* and of the payment \* \* \* to be made \* \* \* during the continuance of this contract, does promise to pay to John M. Armstrong, of Philadelphia, Pa., his assigns, on the 8th day of December, in the year 1897, the sum of ten thousand dollars \* \* \* at the office of the company, in the City of New York, or if he should die before that time, then to make said payment to his legal representatives. \* \* \* If any statement made in the application for this policy be in any respect untrue, the consideration of this contract shall be deemed to have failed, and the company shall be without liability under it. \* \* \* The company between the parties hereto is completely set forth in this policy, and the application therefor, taken together. \* \* \* If any claim be made under an assignment, proof of interest to the extent of the claim will be required. Armstrong executed an assignment of the policy to Benjamin Hunter and left it with the company, and both were delivered by the company to Hunter. Armstrong died; and from the evidence received and that offered, it is to be taken that he died by the hands of Hunter, who planned his death before the insurance, induced him to effect it and make the assignment, paid the first and only premium that was paid, and took his life for the purpose of obtaining the money on this and other policies. They were not related in any way, and no evidence was introduced or offered of any interest in fact which Hunter had in the life of Armstrong. The second defense set out in the defendant's pleadings alleges that Hunter, "being, or pretending to be, a creditor" of Armstrong, did so and so, and the defendant offered evidence to prove the facts set forth in that defense, without offering to prove that he was a creditor any more than that he pretended to be; and this was not understood to be and is not now understood to have been any offer to prove any fact of indebtedness or other interest. The defendant requested the court to instruct the jury that if the com-

pany made no contract with Armstrong, or if the real contract was between the company and Hunter, or if the policy was in fact made and issued for the benefit of Hunter, the plaintiff could not recover. These instructions were not given, and no question was submitted to the jury upon those aspects of the case. The principal questions are whether the facts stated would defeat the plaintiff's recovery, and whether these instructions ought to have been given.

There is no evidence in the case of any intent to defraud or want of good faith on the part of Armstrong, and none was offered to be shown, nor any claim made that there was such. The misconduct and criminality relied upon for defense were wholly on the part of Hunter, and Armstrong was only his victim.

The first two of these instructions could not be given without submitting to the jury questions of contradiction or variation of the policy, which would be a subversion of one of the most important principles of the law of evidence relating to the effect of written contracts—that parol proof is not admissible to alter, contradict, enlarge or vary them—and not only would violate the ordinary presumption of law that the stipulations of the parties are written down in such contracts as finally settled upon and intended, but also the express provisions of this contract that the whole contract and its inducing statements are contained in itself. The other request would submit the effect of the contract and assignment to the jury, when such construction, when the facts to which the instruments apply are ascertained, is always for the court. The whole of this part of the case must depend upon the true legal effect of these contracts. The defendant promised Armstrong to pay his legal representatives ten thousand dollars if he should die before December 8, 1897. He did die before that day. The term representatives, or legal representatives, which is the same thing, for none but legal would be intended, indicates the administrator. *Mason v. Colburn*, 99 Mass. 342. The plaintiff is the administrator in Pennsylvania, the place of the domicile, and in New York, the place of the contract, although some question was made about the effect of the letters in the latter place. She has brought this suit upon this contract, and upon these facts, is entitled to recover, unless something further is shown to defeat it. If he parted with this contract to Hunter, so that his life was insured to Hunter and to Hunter only, from the issuing of the policy to the day named, it is plain that no one could recover for his death. Not Hunter, for he criminally caused the death and could become entitled to nothing by his crime. Not the administratrix, for she would have nothing to recover upon, and could acquire nothing from Hunter, for he could confer no greater right than he had. The contract was with Armstrong, and ran to his representatives, who would be included in him; so it was doubtless at his disposal. So the question is whether he did dispose of it to Hunter. The payment of

the premium by Hunter would not make the insurance his. *Tristen v. Hardey*, 14 Beav. 232; *Ætna Life Ins. Co. v. France*, 94 U. S. 561. The question must turn upon the construction of the written instruments. Choses in actions were not assignable at common law, although for a valuable consideration paid they were assignable in equity. *Bouv. Bac. Abr.*, assignment D, obligation A; *Winchester v. Hackley*, 2 Cranch, 342.

There is, however, no cause of action accrued upon a policy of life insurance until the death insured against happens. Still there is no question but that the accruing right may, with the consent of the insurer, be transferred so that when it does accrue it will accrue to the assignee, and become a right of action in his favor; nor but that before it accrues it may be so assigned as to make the assignee an appointee to receive the funds. *Page v. Burnstine*, 102 U. S. 664. Nor but that after it has accrued it may be assigned in equity like other rights of action not made negotiable in terms. These limitations do not apply to contracts made negotiable in terms, like notes or bonds payable to the bearer or to the order of the payee named. These policies commonly run to some person and his or her executors, administrators and assigns. There are many cases in which they have held to be assignable, but stress is laid upon that form. In *New York Life Ins. Co. v. Flack*, 3 Md. 341; 1 *Bigelow Ins. Cas.*, 146, *Le Grand, C. J.*, laid stress upon the word assigns. In *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398, *Walker, C. J.*, said: "The policy declares in terms that it is assignable. It provides for the payment of the money to the assured or to her assigns. So far then from such an instrument being prohibited it is authorized by the terms of the policy." In *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed, 269, *McKinney, J.*, said: "By the terms of the policy the contract is with the assured, his personal representatives and assigns, and the promise in fact and in law is to pay the money to the personal representatives or the assigns as the case may be." And in *Emerich v. Coakley*, 35 Md. 188, *Grayson, J.*, said: "So far from an assignment being prohibited by the terms of this policy, the amount of the insurance is made payable to her and her assigns." In *Koshkonong v. Burton*, Supreme Court of the United States (14 Ch. L. N., 260), the expression of opinion whether the phrases payable to the order of some person, or payable to some person or his order, would in a statute include a contract payable to a railroad company or its assigns, was expressly waived in the opinion of the court by Mr. Justice Harlan. A general assignment of all insurance policies, where the assignor has some which are assignable and some not, will not carry those not assignable nor such as would be made void by assignment. *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. 81. This assignment is to be looked at in the light of these principles. One branch of the contract ran to *Armstrong* and his assigns, the other to his representative<sup>as</sup> one was

by its terms assignable and the other not, and by general words he assigned. The two expressions stand side by side in the instrument, so that their difference is apparent. According to these principles it would seem to follow that the assignment was intended to carry the branch made to be carried, and not the branch not so made; that the general words of the assignment are restrained by the particular words creating the subject of the assignment. The assignment could not rise higher than the instrument assigned. And further the instrument itself limits the right to be passed to assignees. Such right could not extend beyond an interest in the life of the assured which could be proved. If the interest was that of a creditor, it would be limited by the amount of his probable debt. *Cammack v. Lewis*, 15 Wall. 844; *Thatch v. Metropol. Ins. Co.*, 11 Fed. Rep. 20. As no debt is shown, no interest is shown, and nothing is shown to have passed to the assignee. What did not pass to the assignee was left in *Armstrong*, and accrued to his representative, the plaintiff. As *Armstrong* was innocent, no right of his or of those claiming through him, would be cut off by the wickedness of *Hunter*.

The motion is overruled, judgment is ordered upon the verdict, and the stay of proceedings is vacated.

Other questions were saved by exceptions taken at the trial and allowed, but they have not been argued or relied upon in this hearing.

#### WAREHOUSE RECEIPTS — CONTRACTS — PAROL EVIDENCE—LATENT AMBIGUITY.

STEWART v. PHENIX INS CO.

*Supreme Court of Tennessee.*

1. The rule, that parol evidence of contemporaneous or previous conversations between the parties is inadmissible to qualify the terms of a contract in writing, does not apply to a receipt, unless, though in the form of a receipt it is in substance a contract as sometimes is the case of warehouse receipts. Where the receipt is substantially a contract, the rule applicable to contracts prevails.

2. Though this is the rule as to warehouse receipts as between the original parties, yet inasmuch as such instruments have come to be considered the representative of property and an assignment as equivalent to delivery of the property, the warehouseman is estopped as against an assignee for value without notice to set up facts or agreements contradictory to its terms.

3. Parol evidence may be heard as to an independent collateral agreement, or where there has been a parol agreement and a part only has been reduced to writing, the whole contract may be proven, but in neither case is the writing to be contradicted.

*Myers & Sneed*, for plaintiff in error; *U. W. Miller*, for defendant in error.

McFARLAND, J., delivered the opinion of the court:

The plaintiff, the Phoenix Insurance Company of Memphis, agreed to loan A. J. Vaughan & Co., also of Memphis, \$1,500, but required security. Stewart, Gwynne & Co., the defendants, of the same city, were warehousemen, and had in store cotton belonging to A. J. Vaughan & Co.

The proof indicates that a conference was had between the secretary of the insurance company and a member of each of said firms, in which it was understood that the company was to be secured in its loan to A. J. Vaughan & Co. by a warehouse receipt of the defendants, Stewart, Gwynne & Co., for cotton. Accordingly, on the 14th of June, 1878, the loan was consummated. A. J. Vaughn & Co., executed their note of that date to the plaintiff for \$1,500, due at ninety days. At the same time A. J. Vaughan & Co. delivered to the plaintiff the following:

WAREHOUSE RECEIPT. }  
Memphis, June 14, 1878. }

Received of A. J. Vaughan & Co., at the warehouse of Stewart, Gwynne & Co., in good order, the following cotton:

Marks	Number Bales	Conveyance
Various	40	40 Bales.

Guaranteed valuation, fifteen hundred dollars, deliverable only on return of this receipt, indorsed by the secretary of the Phoenix Insurance Company.

(Signed) STEWART, GWYNNE & CO.

At the maturity of the note, a yellow fever epidemic was prevailing in the city of Memphis, of which the secretary of the insurance company died, and business was suspended. The note was, on the 18th of November, 1878, renewed. At that time Gwynne, a member of the firm of Stewart, Gwynne & Co., who was also a director of the insurance company, offered to deposit a new warehouse receipt, which is specially set out as a collateral in the renewal note. Before the maturity of the new note, to-wit, some time in December, 1878, Gwynne called on the then secretary of the company, and told him that A. J. Vaughan & Co. had failed, and that the cotton then in the warehouse of said firm (S., G. & Co.) on account of A. J. Vaughan & Co. was being replevied by the producers, and requested that the plaintiff take forty bales of the cotton to secure itself, or defend the replevin suits. The secretary of the company then inquired of Gwynne if the cotton then in his warehouse was the same cotton they had on hand when the receipt of the 14th of June was given, and he replied that it was not, or that he did not know that they had any of the same cotton on hand. The secretary then informed Gwynne that the company would have nothing to do with any other cotton, or the defense of the replevin suits.

At the maturity of the renewal note, the secretary of the company called on the defendants for the cotton specified in the receipt, or its guaranteed value, and offered to indorse and deliver

up the receipt according to its terms. The defendants replied that they did not have the cotton, and declined to pay its value. Gwynne testified that at the date of the warehouse receipt, 14th of June, 1878, his firm had in their warehouse about 115 bales of cotton for A. J. Vaughan & Co., nearly all of which was on hand at the maturity of the first note, but admits, substantially, that they had none of this cotton on hand at the time he called on the plaintiff to take away forty bales. He says further that more than forty bales were replevied from his firm by the producers. It is not very clear from his testimony whether at the time the cotton was finally demanded, there was any of the cotton of A. J. Vaughan & Co. on hand. He does not say that at that time he tendered or offered to deliver any cotton. The demand, however, was for the cotton specified in the receipt. The reply was that they did not have it.

The cause was tried without a jury and judgment rendered for the plaintiff for \$1,500, the guaranteed value of the cotton.

The principal assignment of error relied upon is the action of the judge in rejecting certain testimony offered by the defendants; that is to say, they offered to prove that it was agreed between A. J. Vaughan & Co. and defendants, at the time of giving the warehouse receipt, that defendants could hold said forty bales of cotton there in their warehouse, or any other forty bales that might afterwards come in, so they retained on hand as much as forty bales, worth \$1,500, and this for the purpose of giving to A. J. Vaughan & Co. the privilege of continuing to sell their cotton; that this was the reason the cotton was not more particularly described in the receipt.

The proposition was stated in various forms to the court, but upon objection the proposed testimony was excluded. The action of the judge was based upon the familiar rule that parol evidence of previous or contemporaneous conversation between the parties is not admissible to vary the terms of a written contract. The question is, whether the proposed testimony was admissible under any of the various exceptions to this general rule.

1. It is insisted that the rule does not apply to receipts which are always open to explanation. Such is the general rule as to receipts. See *Jones v. Ward*, 10 Yerg. 160. The reason probably is that in general a receipt is not a contract; it is usually but the evidence of a fact—as, for instance, the payment of the money, the delivery of property, the settlement of accounts, etc., in all which cases the receipt may be explained and the facts shown to be otherwise. But a paper may be in form a receipt, and yet be in substance a contract; that is, it may contain an agreement to do or not to do some particular thing in the future. If in substance a contract, the same rules should apply that apply to other contracts. We need not inquire what would be the rule as to warehouse receipt between the orig-

final parties; that is to say, in this case between the defendants and A. J. Vaughan & Co. It may be conceded that as between them the receipt might be explained or contradicted so as to show that no such cotton had been delivered or received. At least this may be conceded for the argument. In view, however, of the importance attaching to papers of this character, and the great extent to which they are used as collaterals in commercial transactions, a different rule at least has been applied where they come to the hands of innocent parties. By custom such receipts have come to be considered as representatives of the property and an assignment equivalent to a delivery of the property to the assignee, and the warehouseman is estopped as against the assignee who has purchased in good faith to deny that he had the articles mentioned in the receipt. See Mr. Justice Miller's decision in *McNeil v. Hill*, 1 Woolw. 96; also 19 Am. L. R. (N. S.) 566; also the general principles settled in the case of *Gibson v. Stevens*, 8 How. (U. S.) 384. So that as against an assignee who has purchased, or to whom it has been assigned in good faith for advances made, the warehouseman can not be permitted by parol to show that he had not the articles mentioned in the receipt at the time it was given. The stipulation upon the face of the receipt that the articles mentioned will be delivered only upon the return of the receipt is a contract upon which the assignee has a right to rely, upon the faith of which he has acted, and for the breach of which he has his action against the warehouseman. It is, therefore, as between the maker of the receipt and an assignee who has in good faith taken it as security for money advanced, not simply a receipt subject to be explained and contradicted by parol proof, but a contract and subject to the rules applicable to other contracts. This is not upon the ground that they are negotiable strictly, but they are *sui generis* and stand upon grounds applicable to that class of paper.

The plaintiff in this case stands in the attitude of an assignee of the receipt in good faith for money then advanced without notice of any infirmity. Although upon its face the receipt shows that the cotton was to be delivered upon the return of the receipt indorsed by the secretary of the insurance company, and although there is proof that the giving of the receipt was agreed upon by all the parties previously, yet the actual transaction in regard to delivering and storing of the cotton was alone between the defendant and A. J. Vaughan & Co., with which the plaintiff had nothing to do, or so far as appears, any knowledge. It is the same, therefore, as if the receipt had stipulated for the delivery of the cotton to A. J. Vaughan & Co., and they had assigned it to the plaintiff. Upon this ground, therefore, the testimony was not admissible.

2. It is insisted that, conceding the writing to be a contract, yet there was a latent ambiguity arising from the proof, which, according to the

familiar rule may be removed by parol testimony; that is to say, it appears that at the time the receipt was given the defendants had on hand 115 bales of cotton belonging to A. J. Vaughan & Co., and the receipt does not designate or distinguish any particular 40 bales out of the 115 bales, and therefore parol proof must be admitted to designate the cotton actually embraced in the receipt. The transfer of the warehouse receipt had the effect of an actual delivery of the cotton to the assignee, to be held as a pledge, and therefore the identical cotton should be designated. And it appearing that defendants had a larger number of bales on hand and the receipt not distinguishing the 40 mentioned from the others, parol proof would have been admissible for this purpose; that is, to designate the bales actually embraced in the receipt. But it does not follow that parol proof is therefore admissible for all purposes. In other words, the ambiguity or uncertainty arising upon the proof as to the identical bales embraced in the receipt may be met or removed by parol testimony; but this does not open the door for the admission of parol proof generally, or for any other purpose.

We need not inquire in this case whether the parol proof would have been sufficient to designate the particular cotton. It is probable the defendants would, in any event, have been liable for the value. They, as we have seen, would have been estopped as against an assignee of the receipts to deny that they had the cotton, and their inability to show that any particular bales were agreed upon to be included in the receipt would probably be no defense for them.

Again, it is insisted that the proposed testimony should have been heard, because it amounted to proof of an independent collateral agreement.

The case of *Simon v. Smart*, 11 Humph. 208, may be given as an illustration of this rule. There was in that case a sale and conveyance of a "tavern house" and lot, and at the same time an independent collateral agreement that the vendor would close up another tavern he owned in the same town. The action was for a breach of this latter contract, and the recovery was held proper. Proof of this collateral agreement, it was held, in no sense varied or contradicted the written contract. And so also where the writing embraces only a part of the contract, as where there was a written contract for the hire of a horse for six weeks at two guineas, parol proof was admitted that the hirer was responsible for all accidents.

So, in the case of *Cobb v. Wallace*, 5 Cold. 539, there was in the first instance a parol contract for the purchase of a load of coal, and for hiring a barge to transport the coal from Hawsville, Kentucky, to Nashville, the barge to be returned as soon as the coal was unloaded. Afterwards, on delivery, there was a written receipt which specified the quantity and price of the coal, and also the hiring of the barge "at three dollars a day until the barge is returned." The suit was for failing to return the barge, and the question was

when it should have been returned. It was held in substance that proof of the previous parol contract was admissible, and that it was for the jury to say whether the writing was intended to embrace all that was finally agreed upon.

It will be observed that under these authorities parol proof may be heard as to an independent collateral agreement, or where there has been a parol agreement and a part only reduced to writing, the whole contract may be proven, but in neither case is the writing to be contradicted.

*Ellis v. Hamilton*, 4 Sneed, 512, was an action upon a note or bill for the payment of a given sum on a particular day. The defense of the surety was that at the time the note was given there was a further agreement, in substance, that the payee of the note was to receive payment in a different mode and that the obligation of the surety was not absolute. The defense was held inadmissible, as this was to contradict the written contract.

We have only to apply these principles to the present case. We have seen that the warehouse receipt in the hands of the plaintiff was a written contract by which the defendants agreed that they held forty bales of cotton delivered to them by A. J. Vaughan & Co., which they promised to hold for the plaintiff and deliver it upon the return of the receipt, indorsed by its secretary. The transfer of this contract vested the right of this particular forty bales of cotton in the plaintiff, to be held as a pledge for the security for their debt. The parol testimony offered was to show that at the time the receipt was given the contract was not that any particular forty bales of cotton were to be held, but that defendants were to keep on hand as much as forty bales of cotton, worth \$1,500, belonging to A. J. Vaughan & Co., subject to this receipt; that they were at liberty any time to exchange the cotton for any other forty bales of equal value.

We think the evidence was properly rejected. It was certainly not an independent collateral agreement; there was but the one contract, either the one specified in the receipt or the parol contract which the defendants offered to prove. Both contracts can not stand. They are different in their terms and in their practical results, and one must give way to the other.

Nor is it a case where only part of the contract was reduced to writing; as we have seen in such cases there is to be conflict between the parol contract and the writing. They stand together and are consistent. The only difference is the writing does not embrace it all.

In our opinion the parol proof in this case contradicts the writing, and is therefore not admissible. It is not easy to see the necessity or advantage to the parties at the time of varying the terms of the receipt as it is insisted was done.

It is admitted that defendants were at all times to keep on hand as much as forty bales of the cotton, worth \$1,500. They might as well keep the

original forty bales as any other. We see no reason at that time to make such stipulation.

The practical difference is that if defendants are allowed to change the contract according to the parol proof offered by them, they claim that the cotton last on hand was taken by a superior title to A. J. Vaughan & Co., and as warehousemen are not warranters of the title they are excused.

It is finally insisted that the obligation of the defendants was in the nature of a guaranty and that they were entitled to notice, but we think it clear that no notice was necessary.

Upon the whole we think there is no error in the record and the judgment will be affirmed.

#### SURETY — CONTRIBUTION — OFFICER HOLDING OVER—BOND.

BOONE COUNTY v. JONES.

*Supreme Court of Iowa, April 24, 1882.*

Where a public officer, upon holding over beyond the term of his office for the want of a successor, executes a new official bond, such bond is an original undertaking, and the sureties on it are not co-sureties with the sureties on his former bond, so as to entitle them to contribution in case of liability for a breach of the bond.

Appeal from Polk Circuit Court.

In 1874 the defendant Jones was elected and qualified as treasurer of the plaintiff. His term of office expired January, 1876. At an election held in 1875 one Snell was elected as the successor or Jones. Snell died before the time arrived for him to qualify. In January, 1876, Jones qualified as a holding-over officer, executed the bond sued on for the full term of two years, and entered upon the discharge of his duties for that time. It is alleged in the petition, in due form, that Jones proved a defaulter, and this action was brought on the bond aforesaid to recover for the defalcation. The appellant intervened, and filed a petition of intervention, claiming rights adversely to the defendants as to the subject-matter of the action, and asking that he be permitted to join the plaintiff in the relief demanded. As grounds for the intervention, the appellant admitted the allegations of the petition and denied those of the answer, and "for cross-bill and grounds of equitable relief herein the intervenor shows unto the court, in addition to the allegations of the petition, in substance the following facts: That, notwithstanding Jones qualified and entered upon the discharge of his duties for the full term of two years, the electors, at an election held in 1876, voted for persons to fill the office of treasurer as though there was a vacancy, when, in fact, there was none. The votes, however, were canvassed, and it was found Jones secured a majority of all the votes cast for said office. That the plaintiff's

board of supervisors entertained the opinion that no vacancy existed, or would exist, after Jones qualified as a holding-over officer, until the expiration of two years thereafter; but, as the election was full and fair, to relieve the question of all doubt, the board gave Jones the option to file another bond and qualify anew, which he did on November 18, 1876. The appellant and others signed such bond as sureties for said Jones. In February, 1878, the plaintiff commenced an action on said bond, alleging that Jones was a defaulter, and for the amount of the defalcation sought to recover on the last named bond. A judgment was rendered in said action against appellant and others for \$14,000, which was afterwards affirmed by this court. For a statement of the issues and questions determined in that action, see *Boone County v. Jones*, 54 Iowa, 699. That in truth and in fact the said Jones did not become a defaulter after the execution of the last named bond, but that the defalcation for which a recovery was obtained against the appellant occurred prior to the 18th day of September, 1876, and the defendants became and are liable in equity for such defalcation. That the question as to when the defalcation occurred was not adjudicated by the court in the action aforesaid, because it was therein held the sureties were, by reason of the existence of certain facts, estopped from establishing the truth in relation thereto. That the bond signed by the appellant was "secondary and additional, or merely surety for the former bond, and the plaintiff ought to be required to exhaust its remedy against that bond before compelling him to pay any part of said judgment." The relief asked is that the court require the defendants to pay all the defalcation, and in case it is found the bond signed by the appellant supersedes the bond sued on, the amount of the defalcation under each bond be ascertained, and that judgment be rendered against defendants for the defalcation prior to September 18, 1876. In an amendment to his petition appellant states he has paid to the plaintiff \$2,500 on the bond signed by him, and judgment is asked against the defendants for that amount, and also that he be subrogated to all the rights of the plaintiff. To the intervening petition and amendment some of the defendants demurred, on the ground, among others specified, that the facts stated do not entitle the appellant to the relief demanded. The demurrer was sustained, and the intervenor appeals.

*Hull & Whittaker* and *H. W. Maxwell*, for appellant; *Wright, Cummins & Wright*, for defendants.

SEEVERS, C. J., delivered the opinion of the court:

1. It is insisted that the bond executed by the appellant was secondary or additional to the bond sued on, and therefore the sureties on the last named bond are primarily liable, no matter when the defalcation occurred. As a holding-over of-

ficer, Jones could only hold until the next general election, and the qualification of his successor chosen at that time. *State v. Bagwell*, 54 Iowa, 487. It is also said it is secondary, because the board of supervisors, the defendants and Jones understood the latter would hold the office for two years as a holding-over officer. The understanding of the parties can not control as to the length of time an officer will hold his office when the term is fixed by statute. The bond signed by the appellant, therefore, was not secondary, but an original undertaking.

2. The appellant claims the true doctrine "to be that where a surety pays the debt of a principal he may compel his co-sureties to contribute, and if the creditor has other securities out of which the debt can be made, then the surety paying the debt will have the right to full substitution and reimbursement." Conceding this to be so, it is evident the latter part of the proposition depends upon the question whether the right to contribution exists, and that depends on the further question whether the person demanding contribution is a co-surety with the person on whom the demand is made. Several persons may be sureties for another to the same creditor, and yet not be co-sureties. It may not be essential they should be bound by the same instrument, but they must be sureties bound for the performance of the same thing. The defendants were only bound for the performance by Jones of the duties incumbent on him for a period extending from the execution of the bond signed by them until the eighteenth day of September, 1876, and the liability of the appellant began when that of the defendants ceased. Suppose the county had recovered of the defendants for a defalcation which occurred during the first named period, could they have compelled appellant to contribute in payment of the judgment on the ground he was a co-surety with them? Clearly not; because the appellant never bound himself or became responsible for such defalcation. The converse of this proposition must be true; and that is, if there was a defalcation after the eighteenth day of September, 1876, the appellant could not require the defendants to contribute to the payment of such defalcation. Therefore the defendants and appellant are not co-sureties entitled to contribution.

It is urged the demurrer admits the defalcation occurred prior to September, 1876, but this fact has no bearing whatever on the question of contribution. Conceding the admission to have full force and effect, it amounts to this: that the appellant has paid, or been compelled to pay, the debt of the defendants, because a judgment has been rendered against him therefor. Now, as we have seen the appellant is not entitled to contribution, is he entitled to recover because he has paid the debt of another under the circumstances stated in the pleadings? This question has not been presented by counsel for the appellant. There is some doubt whether such a case would

come within the jurisdiction of a court of equity. But, whether this is so or not, we do not feel called upon to determine the question suggested. Affirmed.

## WEEKLY DIGEST OF RECENT CASES.

### ATTACHMENT—SERVICE OF PROCESS—REQUISITE DILIGENCE.

The absence of any proof in an affidavit for an order of publication, relating to the subject of diligence in the effort to serve the summons, especially where it appears that the defendants are non-residents of the State and engaged in business at their residence, is not fatal to the jurisdiction of court so as to invalidate an attachment, where the motion to vacate such attachment is made, not by the debtors, but by another creditor. *Smith v. Mahon*, N. Y. Supreme Ct.

### BANKRUPTCY—ATTACHMENT—JURISDICTION OF STATE COURT.

The assignee of a bankrupt's property to his assignees does not of itself divest the jurisdiction of a State court, in which attachments against the bankrupt's property had been issued more than four months preceding the bankruptcy, of its jurisdiction to determine the relative rights of the attaching creditors and the assignees, and to subject the property to the satisfaction of such debts. In such case the assignees may appear in the State court, and, having appeared, they are bound by its decree; and in case of a sale under its decree for an amount insufficient to pay off the attachment liens, they are divested of all interest in the property, and can not assert in any other court any interest in such property. *Davis v. Friedlander*, U. S. S. C., October Term, 1881.

### CONTRACT—ADVERTISEMENT—REPRESENTATION—BURDEN OF PROOF.

Defendant, a money lender, issued an advertisement headed, "Money on easy terms," and containing a statement that money would be advanced on note of hand to, among others, farmers, on easy terms, and on reversions, etc., at 5 per cent. No other rate of interest was mentioned in the advertisement. The plaintiff, a farmer, having seen the advertisement, went to the defendant's office, and applied for a loan of 100l. He swore that the defendant's agent then told him he could have it at 5 per cent., and after negotiations agreed to take 4 1-2, and that he executed a bill of sale, as he believed, to secure 100l. with interest at 4 1-2 per cent. by weekly installments. The bill of sale was in fact a security for the repayment of 150l. by weekly installments of 2l. 10s. Held, in an action to set it aside, that where a man represents to the public by advertisement that he will lend money on easy terms, and afterwards lends it on very hard terms, the onus lies upon him to show that he has removed from a borrower's mind the impression produced by such representation, and clearly explained to him the terms on which the loan has been made. On the evidence, the court believed the plaintiff's statement, and set aside the bill of sale. *Moorhouse v. Woolfe*, Eng. High Ct., Ch. Div., March 22, 1882.

### CONVEYANCE—ACKNOWLEDGMENT—JUSTICE OF THE PEACE—LEX LOCI REI SITÆ.

A deed acknowledged before a justice of the peace, who describes himself as such in his certificate and signs the certificate as such, is sufficiently executed and certified to by the laws of Michigan, without any authentication of the official character of the justice of the peace beyond his own certificate of the fact; and the certificate need not state in so many words that the party was personally known to the officer taking the acknowledgment. Having been executed in conformity with the laws of Michigan, and recorded in Illinois, a certified copy of such deed, with the requisite certificate of conformity annexed, is admissible in evidence, according to the laws of Illinois, in relation to deeds executed and acknowledged out of that State, after proof of the loss of the original. *Elwood v. Flannigan*, U. S. S. C., October Term, 1881.

### COPYRIGHT—EVIDENCE OF COMPLIANCE WITH THE STATUTE.

Under secs. 4956-4961 of the United States Revised Statutes, relating to copyrights, the deposit of two copies of the book, after its publication, either with the librarian of Congress, or in the mail addressed to him, is an essential condition of the proprietor's right, and must be proved in an action for infringement. The court expresses no opinion as to whether the certificate of the librarian that such deposit had been made would be competent evidence of the fact. But certainly a memorandum reciting that such deposit had been made, written under the certificate, after the signature and seal, is not competent evidence, except perhaps as against the party making it, such memoranda being no part of a certificate. *Merrill v. Tice*, U. S. S. C., October Term, 1881.

### CORPORATION—TRANSFER OF STOCK INDUCED BY FRAUD—"FREEZING OUT."

Where defendant and other directors of a corporation levied an assessment upon stock of a corporation, upon which but a small proportion of the par value had been paid, and threatened future assessments for the purposes of the corporation, whereby plaintiff was induced to sell and transfer his stock, held, that such sale was not so tainted with fraud as to render it void. *Grant v. Attrill*, U. S. C. C., S. D. N. Y., March 21, 1881.

### CRIMINAL LAW—DIRECTING A VERDICT.

In a criminal case the court can not direct a verdict of guilty even where the facts are admitted beyond dispute, and the question of guilt or innocence depends wholly upon a question of law which the court must determine. *United States v. Taylor*, U. S. C. C., D. Kan., March, 1882.

### CRIMINAL LAW—MURDER IN FIRST DEGREE—INSTRUCTIONS—ERROR IN, WHEN NOT CURED.

On the trial, which was on an indictment for murder in the first degree, the jury were instructed that if they believed the defendant wilfully, deliberately and premeditatedly killed the deceased they will find him guilty of murder in the first degree: Held, erroneous, in that it ignores the question of malice, and permits the jury to find defendant guilty without finding that the killing was "with malice aforethought." In another instruction the jury were told that if defendant wilfully, premeditatedly and designedly, and of his malice aforethought killed the deceased, they would convict him of murder in the first degree. Held, erroneous, in ignoring the element of deliberation. Held, also, that the errors in the above instructions

tions were not cured by another instruction which the court gave of its own motion, and which properly submitted to the jury all the elements constituting the crime of murder in the first degree. *State v. Hill*, 69 Mo. 451; *State v. Simms*, 68 Mo. 305; *State v. Dearing*, 68 Mo. 532; *State v. Mitchell*, 64 Mo. 192; *Jones v. Talbot*, 4 Mo. 279; *Hickman v. Griffin*, 6 Mo. 87. *State v. Pasqueth*, S. C. Mo., May, 1882.

#### EQUITY—PRIORITY OF JUDGMENT—DISTRIBUTION *PARI PASSU*.

When an attorney at law obtains a judgment in the capacity of executor, and is at the same time attorney for other parties in a suit against the same defendant, and a few days later obtains a judgment for them also, the court, in applying the proceeds of an equity of redemption, to the satisfaction of these judgments, will recognize no priority, but will distribute *pari passu*. It is doubtful whether the rule heretofore frequently followed by this court of distributing the proceeds of an equity of redemption among judgment creditors in the order of their priority in obtaining their judgments, is the correct rule. *Poole v. Daly*, Sup. Ct. Dist. Col., January Term, 1882.

#### ESTOPPEL—BONDS OF CORPORATION—RECITALS.

Where bonds of a corporation which have passed into the hands of a *bona fide* holder recite on their face that all the conditions precedent to their lawful issue have been complied with, this recital is conclusive and binding on the corporation. *Clay County v. Society for Savings*, U. S. S. C., October Term, 1881.

#### HUSBAND AND WIFE—WIFE'S REAL ESTATE—PAROL LEASE.

A lease of the lands of a married woman for a term of three years is not an incumbrance or conveyance, within the meaning of the act touching the marriage relation, construed in connection with the provisions of the act concerning real property. When the legislature provided that a married woman should have no power to incumber or convey her lands except by deed, in which the husband should join, they did not intend to make a written lease necessary which would not be necessary in other cases; and, generally, a parol lease is good for a term not exceeding three years. *Pearcey v. Henley*, S. C. Ind., May 22, 1882.

#### INSOLVENCY—CONFESSION OF JUDGMENT—BONA FIDE CREDITOR.

The confession of a judgment to a *bona fide* creditor, even though it have the effect of giving him the preference over other creditors, is not a fraudulent disposition of an insolvent estate. *Walker v. Marine National Bank*, S. C. Pa., January 2, 1882.

#### INSURANCE, LIFE—ENDOWMENT POLICY—PAYMENT OF PREMIUMS—CHANGE OF AGENCY.

A person holding an endowment policy, upon which he must pay annual premiums, is entitled to notice of change of agency of the insurance company before it can insist on payment of the annual premium on the very day it becomes due. *Briggs v. National Life Ins. Co.*, U. S. S. C., Dist. Mass., April 14, 1882.

#### JURISDICTION—WHAT IS "A FEDERAL QUESTION?"

A controversy between a maker of certain notes, secured by trust deed on realty, and a national bank which held the notes and was attempting to enforce such deed, as to the right of a national bank to deal in notes secured by realty, is a Federal question; but it is now settled that such a

question can not be raised by the debtor as a defense, but only by the government. *Swope v. Leffingwell*, U. S. S. C. C., October Term, 1882.

#### MANDAMUS—OFFICE OF WRIT—PUBLIC OFFICER.

1. A writ of *mandamus* can compel a public officer to do only what the law has made it his duty to do, and can not issue to one officer to compel another to do his duty. 2. Hence, where the board of commissioners of a county in Alabama, when ordered by *mandamus* to levy and cause to be collected a tax, held a meeting, levied the tax, ordered the tax collector to collect it, and so far set the machinery of collection in motion that it depended on the tax collector alone to collect it, and, on his failure to do so, informed the Governor of the State of the fact, the duties imposed on them by the State statutes were fully performed; an order committing them for contempt for not causing the collection of the tax was *coram non judice* and void, and a *habeas corpus* was granted to release them from imprisonment. *Ex parte Rowland*, U. S. S. C., October Term, 1881.

#### NEGOTIABLE PAPER—NOTE—ACCOMMODATION INDORSER—RELEASE.

If the holder of a negotiable note, after the liability of an accommodation indorser has become fixed by notice of dishonor and protest obtains judgment against the maker of the note and levies an execution, issuing under said judgment on sufficient personal property of the maker to pay the debt, and then voluntarily releases the levy to the maker, he (the holder) by such release, discharges such indorser. *Weimar v. Shelton*, 7 Mo. 237; *Ferguson v. Farmer*, 7 Mo. 497; *Smith v. Rice*, 27 Mo. 505. *Priest v. Watson*, S. C. Mo., May, 1882.

#### PARTIES—HEARD, AS MATTER OF CAUTION—APPEAL.

An application for a writ of *mandamus* to compel the lower court to allow an appeal from a decree confirming a sale refused, it appearing that the petitioner had not been a party to the suit in the lower court, had no interest in setting aside the sale, and had been heard in the lower court out of abundant precaution merely, and not as a matter of right. *Ex parte Cockcroft*, U. S. S. C., October Term, 1881.

#### PARTIES—INTEREST.

A party who invokes the decision of a court must have a present interest, and it is not enough for the party to show that he may be interested at a future time. *Walker v. Marine Nat. Bank*, S. C. Pa., January 2, 1882.

#### PARTNERSHIP—WHAT IS A FIRM DEBT—CONSIDERATION.

Where money is obtained on the personal credit of a member of a firm, and the money goes into the firm and is used for its exclusive benefit, though this would not make the firm liable to the creditor, yet it would be a good consideration to support the subsequent promise of the firm to pay the debt, and a judgment confessed on such assumption is not fraudulent as to creditors. *Walker v. Marine National Bank*, S. C. Pa., January 2, 1882.

#### PATENT—ASSIGNMENT BY CORPORATION—ATTACHMENT—ESTOPPEL.

1. Assignments of patents not being required to be under seal, an assignment of a patent by a corporation by a writing naming the corporation as the contracting party, and signed "C. F. Smith, president of the \* \* \* company," but without the seal of the corporation, is sufficient to pass the title of the company. 2. The attachment of the

stock of a shareholder of a corporation by one of his creditors does not incur the property of the corporation, or affect its right to assign it. 3. The sale of an interest in a patent by one not having any title thereto, will operate by way of estoppel against him in case he subsequently acquires title; but the court declines to decide whether it would have such effect against his part owners. 4. Under the special contract in the case at bar, held, that two part owners of a patent could not maintain a suit for infringement against a licensee of the other part owner. *Gottfried v. Miller*, U. S. S. C., October Term, 1881.

**PATENT—IRON FROM FURNACE SLAG—VOID FOR WANT OF ORIGINALITY.**

The patent granted October 14, 1873, to Vinton for an improvement in the manufacture of iron from furnace slag, held void in so far as it claims originality for the manufacture of iron from the trough runners, or for the use of a cupola furnace in remelting such trough runners or heavy slag, or for the process of making slag granulous or spongy by passing water or air through it, or for the method of charging the cupola furnace and smelting the slag described in his patent, or for the employment of a cinder notch in a cupola furnace; the evidence showing that there was nothing new in any of these claims. Nor is the application of a cinder notch to a cupola furnace to draw off the cinder when the furnace is employed in smelting furnace runners or heavy slag patentable. *Vinton v. Hamilton*, U. S. S. C., October Term, 1881.

**PLEADING—GENERAL DENIAL—DEFENSE ADMISSIBLE UNDER.**

Where, in an action on a bond given for the faithful performance of services as agent, the answer is a general denial, it is competent to show a full adjustment of all matters relating to the agency, and that in settlement the defendant paid the sum of \$40, and gave his note for the balance of the indebtedness, though such defense was not specially pleaded. *Wheeler & Wilson Manfg. Co. v. Tinsley*, S. C. Mo., May, 1882.

**PUBLIC LANDS—ISSUE OF PATENT.**

When by a treaty a certain amount of land is granted to an Indian chief, the patent for which does not issue till after his death, the title to the same is vested in those holding under a deed made by him before his death, and not in those claiming by deed from his heirs. *Elwood v. Flannigan*, U. S. S. C., October Term, 1881.

**SEDUCTION—DAMAGES—FINANCIAL CONDITION OF DEFENDANT—ABORTION.**

1. Suit by appellee for seduction. One of the instructions complained of fairly imparts that the limited financial condition of the defendant could not be considered in diminution of the actual compulsory damages to which the plaintiff may have shown herself to be entitled, but that the jury might consider such financial condition in mitigation of any other damages which they were authorized to assess against the defendant. So construed, the defendant has no cause to complain of the instruction. 2. Testimony was admitted showing that an abortion had been produced on the plaintiff, but it was not shown that the defendant had any connection with the procuring of the abortion. The fact of the abortion tended to corroborate the statements of the plaintiff as to her condition of pregnancy, and as the court expressly charged that the abortion could not be considered for the purpose of affecting the

amount of damages to be recovered, no harm was done by its admission. *Wilson v. Shepler*, S. C. Ind., May 22, 1882.

**SURETY—PROMISSORY NOTE—RENEWAL INDUCED BY FRAUD—FORGERY.**

The complaint of the appellee alleged the making of a note by Halpert and Lovinger, which was twice renewed, Halpert each time bringing a new note with Lovinger's name signed thereto; that these renewal notes were forgeries as to Lovinger; that Halpert was insolvent, and asking for judgment on the original note as against Lovinger. Lovinger answered that he signed the note only as the surety of Halpert, and was released by the extension of time; also, that long after the first note became due Halpert was solvent, and that by its negligence in not notifying him of the forgery sooner he was unable to protect himself by recourse to Halpert. The answers were bad. There was nothing alleged from which culpable negligence on the part of the bank can be inferred, or that there was unreasonable delay in giving notice of the forgeries. The plaintiff was therefore entitled to recover. The pretended renewals were invalid as contracts for the extension of the time of payment, as they might have been repudiated on discovery of the fraud, treating the amounts paid for interest on the forged notes as payments on the original note. *Lovinger v. First National Bank*, S. C. Ind., May 23, 1882.

**WITNESS—COMPETENCY OF WIFE.**

The statute confines the competency of the wife as witness for her husband to cases in which she has acted as his agent. *Wheeler & Wilson M'fg Co. v. Tinsley*, S. C. Mo., May, 1882.

**QUERIES AND ANSWERS.**

1.\* The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.

**QUERIES.**

57. The South Carolina statute law provides, "That no mortgage of personal property shall be valid so as to affect the rights of subsequent creditors for value without notice, unless the same shall be recorded," etc. M, the mortgagee of an unrecorded chattel mortgage, after condition broken, takes possession of G's, the mortgagor's, stock of goods to foreclose. C, a subsequent creditor without notice, gets judgment against G, levys execution and seizes the goods that were in the possession of M. First, as between M and C, who has the highest right to the goods? Second, are the rights of a mortgagee of personal property changed by seizure to foreclose, and, if so, how? *Chester, S. C.* G. W. G.

58. A, an assignee under the State insolvent law of Kansas, sells at private sale, on credit, having first obtained an order of sale from the court, to sell for cash a large number of horses and mules belonging to the estate of his assignors. The horses and mules, at the time of the sale were affected with glanders, and a large number died within a few days after sale and

delivery. The sale was confirmed by the court on the assumption that it was made for cash. The assignee knew of the glandered condition of the horses at the time of the sale, but the purchasers were ignorant of it until some days after the confirmation of the sale. Under the laws of Kansas, it is made a misdemeanor to knowingly sell glandered horses. In an action for the price of the horses can the purchasers as against the assignee rely on the above facts to defeat *pro tanto* a recovery of the purchase price? S. & S.  
Atchison, Kan.

#### RECENT LEGAL LITERATURE.

**INSURANCE DIGEST.** Hine and Nichols New Digest of Insurance Decisions, Fire and Marine, together with an abstract of Law on each Important Point in Fire and Marine Insurance. The whole being intended as a complete Handbook of the Law, as established by the most recent Adjudications in the Courts of this Country and Great Britain. By C. C. Hine and Walter S. Nichols, Editors Insurance Law Journal. New York, 1882: The Insurance Monitor.

The object of this volume is to digest the later decisions upon the topics of Fire and Marine Insurance, more particularly those rendered since the publication of the latest insurance digests and text books. Of these full digests are given, together with the citation of several thousand previous cases in which similar points were adjudicated and which were quoted by the courts in support of the doctrines enunciated. To give completeness to the work as a book of reference, a brief abstract of the law on each topic, with a selection of standard cases in support, precedes the regular digest of recent cases. Nearly two hundred topics alphabetically arranged are thus separately treated. To further facilitate reference to any subject, a copious topical index is added at the end of the work, by means of which subjects which are treated under several captions can be found.

**TYLER ON INFANCY AND COVERTURE.** Commentaries on the Law of Infancy, including Guardianship and Custody of Infants, and the Law of Coverture, Embracing Dower, Marriage and Divorce, and the Statutory Policy of the Several States in respect to Husband and Wife. By Ransom H. Tyler. Second Edition. Albany, 1882: William Gould & Son.

This volume is composed of what really amounts to two books for the two topics, and their treatment are so entirely independent of each other that a separate index and tables of cases and contents would render them ready for independent publication. The ground covered is quite extensive, as will be seen from an examination of the table of cases, in which appear but little short of 12,000 citations. The author's work seems to be carefully and painstakingly performed, and the numerous changes in the law by the enactment of

statutes in many of the States for the relief of married women, which have gone into effect since the issue of the former edition (1868), are carefully noted. The author's method of arrangement can not be commended as logical, and each division of his subject seems to have been treated indifferently as it came into the writers head, without reference to its logical relations to the rest of the work. The matter of abbreviations, too, is a small matter, but it is one in which most writers find it worth their while to conform to the accepted usage. The use of "R" in indicating a volume of reports (thus *Demarest v. Wyncoop*, 3 Johns. Ch. R. 129, instead of *Demarest v. Wyncoop*, 3 Johns. Ch. 129), is unwarranted.

#### NOTES.

—A lawyer in Bangor, Me., has brought suit for \$5,000 damages against the publishers of a history of Penobscot county which reported him as dead, and gave him a complimentary obituary sketch. This is the first time we ever knew a lawyer, "living or dead," to sue anybody for saying a good thing of him.—*Chicago Legal News*,

—Some years ago Col. V., who was a lawyer of this place, and a man of considerable self-esteem, argued one of his own cases before the Supreme Court of Georgia. In opening his address he said: "May it please your Honors, there is an old French maxim, that a lawyer who argues his own case has a fool for a client;" and then went on to win his case, and, of course, to refute the "old French maxim." He requested Judge M., who was to remain in Atlanta a few days, to telegraph him at Augusta the decision in his case. The judge telegraphed: "As to old French maxim, affirmed; as to case, reversed."

—Chief Justice Cavendish met his death in the fifteenth century in a manner which is recalled in a remarkable way by the fate of his descendant, the late Chief Secretary. During the rebellion of Wat Tyler, which was probably the most serious effort of communism known in this country, the house of Chief Justice Cavendish, in Suffolk, was attacked and sacked by many thousands of the adherents of the Adam and Eve philosophy. The aged judge was dragged into the marketplace of Bury St. Edmunds and beheaded after a mock trial. His name occurs in the Year Books of Edward III., and he is best known by a decision, or rather by a confession of inability to decide, which was as well acknowledged in his day as in ours. A question arose before him as to the age of a lady; and, on a suggestion that she might be brought into court, he is reported to have said: "There is no man in England who can rightly decide whether a woman is below age or of full age, for some women who are thirty years old like to look eighteen."—*Law Times*,